Supreme Court, U.S.
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No. 02-1221

IN THE

# Supreme Court of the United States

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UNITED STATES SHOE CORPORATION,
*Petitioner*,

v.

UNITED STATES OF AMERICA,
*Respondent*.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

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## BRIEF OF PEARSON EDUCATION, DANIEL F. YOUNG, INC., SCHENKER, INC. AND OTHER NAMED PARTIES AS *AMICI CURIAE*, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Al-Zamil Co., Inc.
Alan Grant Rubber Division.,
Imperial Commodities Corporation
A.M. Todd Company
Angelus Sanitary Can Machine Co.
BHA Group International, Inc.
Badger Fire Protection
Besser Company
Bobrick Washroom Equipment, Inc.
C&D Technologies, Inc.
Confab, Inc.
Condor Products Company, Inc.
Desert Whale Jojoba, Inc.
Diagraph Corp.
Glico Apple Corp.
Marnico Carpet Mills
Metro Freight Services, Inc.
OCI. International, Inc.
OPW Fueling Components, Inc.
Overseas Operations, Inc.
Reckittt Benckiser
Schott Glass Technologies, Inc.
Silbond Corp.
Sims Portex, Inc.
State Oil Company, Suriname
Trak International, Inc.
(parent: Omni Quip International, Inc.)
Universal Business Corporation
Unsworth Transport International, Inc.
The Vendo Company
W.A. Baum, Inc.
Wagstaff, Inc.

## QUESTION PRESENTED

Whether petitioner was denied substantive due process of law guaranteed by the Fifth Amendment of the United States Constitution when the respondent federal government arbitrarily, unreasonably, and unfairly retained interest owed to petitioner on Harbor Maintenance Taxes collected in violation of the Constitution.

## TABLE OF AUTHORITIES

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## STATEMENT OF INTEREST[1]

Rodriguez O'Donnell Ross Fuerst Gonzalez & Williams represents 35 exporters and freight forwarders that are agents for hundreds more exporters seeking refunds of Harbor Maintenance Taxes collected in violation of the Constitution during the period January 1987 through March 1998 together with interest on the amount of these taxes.

These exporters and forwarders share a common interest with petitioner, United States Shoe Corporation. All of these parties gained their rights to refunds of Harbor Maintenance Taxes during the original U.S. Shoe Corporation case in which this Court declared the tax law unconstitutional on March 31, 1998. Now all will benefit justifiably should the Court order the respondent government to pay interest for depriving them of their Harbor Maintenance Tax (HMT) funds.

These *amici* include some large producers, freight forwarders and shippers, but generally they are small and medium-sized companies from every region around the United States and located in many of the nation's port cities on the east, west, and Gulf coasts and in the Midwest.

Fair and just treatment of these and thousands of other U.S. exporters will enhance the economy of this country. Arbitrary and unfair withholding of justly earned interest from their funds, withheld and used by the government for as long as 16 years from 1987, represents a denial of their property rights under the Due Process Clause of the Constitution's Fifth Amendment.

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[1] Pursuant to Rule 37.2(a), letters of consent from both parties have been filed with the Clerk. Pursuant to Rule 37.6, counsel represent that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici*, their members, or counsel made a monetary contribution to preparing or submitting this brief.

## SUMMARY OF ARGUMENT

Petitioner U.S. Shoe Corporation has received a judgment by this Court for a refund of Harbor Maintenance Taxes, but the United States has denied petitioner full compensation by refusing to pay petitioner the proceeds it earned on the money while holding that money unlawfully. Respondent's retention of the interest on petitioner's tax funds amounts to a violation of the Due Process Clause of the U.S. Constitution. The concept of a government prohibited from depriving citizens of life, liberty and property without due process of law has its roots in the *Magna Carta*, which prohibited the monarch in England from interfering with the rights of the people by any actions that did not comply with the "Law of the Land." Cases decided under the United States Constitution have firmly established that this clause is a prohibition against the arbitrary, capricious, unreasonable or unfair exercise of power in violation of the individual rights of the people. In the present case before this Court, petitioner has been a victim of such arbitrary, unreasonable and unfair conduct on the part of the government of the United States. The government's retention of the interest is fundamentally unfair in that the government is profiting from an unconstitutional act while depriving exporters of their property rights.

The government's actions also violate equal protection of the law under the Fifth Amendment because exporters subjected to the Harbor Maintenance Tax have been treated differently from every other taxpayer—all of whom receive interest on refunds of overpayments.

## ARGUMENT

I. The federal government's retention of interest on Harbor Maintenance Taxes owed to Petitioner represents a denial of substantive due process under the Constitution.

Persons in the United States are entitled to due process of law that is both procedural and substantive, and these rights apply to petitioner and approximately 7,500 exporters claiming refunds of the Harbor Maintenance Tax together with interest. As stated in the Fifth Amendment to the Constitution of the United States:

> "...nor be deprived of life liberty or property without due process of law."

It is well established that this clause recognizes substantive as well as procedural rights. *Washington v. Glucksberg*, 521 U.S. 702, 719-720 (1997); *Henkels v. Sutherland*, 271 U.S. 298, 301 (1926); *Albright v. Oliver*, 510 U.S. 266, 272 (1994); *Board of Regents v. Roth*, 408 U.S. 564, 571-572 (1972).

This Court and other federal courts have ruled that substantive due process includes the right of persons to be free from arbitrary, capricious and unreasonable actions by the government with respect to private property. "For example, in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976), the Court held that due process requires an inquiry into whether a legislature acted in an arbitrary and irrational way when passing a retroactive law imposing liability on coal mine owners for death or disability of miners due to black lung disease." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 547 (1998) (Kennedy, J., concurring).

Although the Harbor Maintenance Tax was not a retroactive law, it was arbitrary in that it flagrantly ignored

the constitutional prohibition against taxing exports. *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998).

In *Henkels v. Sutherland*, 271 U.S. 298, 301 (1926), this Court held that it was a violation law to seize Henkels's property illegally as alien property under the Trading with the Enemy Act and deny him payment of interest or proceeds from the sale of his stock when the government had used the property's value and reinvested it to the benefit of the government. The Court ruled that although the government ordinarily need not compensate a citizen for the lost time-value of money taken wrongfully,

> it cannot confiscate the actual increment of property belonging to a citizen or the increment of the proceeds into which such property has been converted any more than it can confiscate the property or its proceeds without coming into conflict with the Constitution.

*Id.* at 301.

This case is directly applicable to *U.S. Shoe Corp.*, *supra*, which involves the unconstitutional appropriation of privately owned Harbor Maintenance Tax monies invested by the government for gain. In each case, the government arbitrarily refused to pay the proceeds it earned from money that it never had a legitimate claim to possess.

This Court has also recognized a due process right to a refund of unlawfully exacted taxes. *McKesson v. Div., of Alcoholic Beverages*, 496 U.S. 18 (1990). "[I]f a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide

meaningful backward-looking relief to rectify any unconstitutional deprivation." *Id.* at 31.

The withholding of interest arising from an unconstitutional tax is an arbitrary and unreasonable exercise of government power. This Court ruled in *U.S. Shoe I* that the government never had any right to the monies it exacted by taxing exports via the HMT. It follows that the government has no right to the interest created by those unlawfully held funds. The idea that whoever rightfully owns the principal is entitled also to the interest it generates is "deeply rooted in this Nation's history and tradition" (*Glucksberg*, 521 U.S. at 721). "The rule that 'interest follows principal' has been established under English common law since at least the mid-1700's. '*Interest shall follow the principal, as the shadow the body.*' Not surprisingly, this rule has become firmly embedded in the common law of the various States." *Phillips* v. *Wash. Legal Found.*, 524 U.S. 156, 165 (1998) (emphasis added) (internal citation omitted).

At bottom, the government has violated the substantive component of the Due Process Clause because it can make no reasonable argument as to why it would possibly be entitled to keep the money it earned by unconstitutionally exacting and holding $1.435 billion. If it lacked any legitimate claim to the money, then it can have no legitimate claim to the actual proceeds earned on that money. See *Henkels*, 271 U.S. 298.

## II. The government's failure to pay interest on Harbor Maintenance Taxes violates equal protection of the law

Petitioner and the *amici* represented in this brief assert the primary positions that U.S. Shoe Corporation is entitled to interest pursuant to statutes, 19 U.S.C. § 1505 and 28 U.S.C. §2411, and pursuant to substantive due process under the Fifth Amendment. They preserve all other arguments advanced in support of the Petition for Writ of Certiorari.

Alternatively, as long as the respondent government pays interest on overpayments of taxes and customs duties, but not to exporters whose money was taken via the Harbor Maintenance Tax in violation of the Constitution, then unfairness and inequality prevail. This unfairness represents a deprivation of property without due process of law and is also a denial of equal protection protected by the Fifth Amendment. In short, it is essential to reimburse interest to U.S. Shoe Corporation and all other exporter claimants in order to establish fairness and equal protection pursuant to the Fifth Amendment.

## CONCLUSION

The Petition for Writ of Certiorari filed by United States Shoe Corporation should be granted.

Respectfully submitted.

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Fuerst Gonzalez & Williams

Carlos Rodriguez
Todd C. Fineberg

Dated: April 23, 2003